IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Government,	No. 08 CR 888
vs.	Chicago, Illinois
ROD BLAGOJEVICH, Defendant.	June 10, 2011
	9:43 o'clock a.m.

VOLUME 31
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. ZAGEL
AND A JURY

For the Government:

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(The following proceedings were had out of the presence of the jury in open court:)

THE CLERK: 2008 CR 888, United States versus Rod Blagojevich.

:18AM THE COURT: Do we have any idea where the attorneys are?

MS. HAMILTON: I looked in the hall. I have to see where.

(Brief pause).

:19AM MS. HAMILTON: They're not in the hallway. Mr. Walker said he can't find them.

(Brief pause)

MR. GOLDSTEIN: Good morning, Your Honor.

Aaron Goldstein, Lauren Kaeseberg, Elliott

:22AM Riebman, and Mr. Sorosky will be here shortly, on behalf of Rod Blagojevich.

MR. SCHAR: Reid Schar, Carrie Hamilton, and Chris Niewoehner on behalf of the United States.

THE COURT: What's left over from yesterday

:22AM which I wanted to address now because it's an issue with the jury instructions--the just has just arrived--and that was the misprint or the typographical error on Page 44 of the instructions. This has now been, I believe, corrected in the

:22AM books. Is everybody satisfied with this?

MR. SCHAR: Judge -- sorry.

THE COURT: Go ahead.

MR. SCHAR: I was just going to say I believe you're absolutely correct. And I think it's the government's position that, you know unless the defense insists, I don't think the jury needs to be brought out and re-read the instructions.

MS. KAESEBERG: We're okay with that.

THE COURT: That's fine.

:23AM For the purpose of the rest of the day, obviously if the jury has any questions, we're going to bring everybody back. So don't go far.

Another thing is, I have I think now two motions for a mistrial which I am going to attempt :23AM to rule on today. I don't think we're going to have any idea of how long this jury is going to sit with two possible exceptions:

They might tell the Court security officer what their schedule is. It's my practice for the :24AM schedule to be left in the hands of the jury and not imposed by me. And frequently, they will send a message out telling us what their schedule is. That might give us some hint as to how long they intend to deliberate.

:24AM And the second thing, of course, is if they

send a question which will give us an idea.

So that's what we're going to do with that.

I have a prolonged sentencing hearing today which has not yet started. If I need you back here for some reason, you can count on about 15 minutes notice.

Anything else?

MS. KAESEBERG: Just one minor thing. I just wanted to be sure for the record that our motions for judgment of acquittal at the close of all the evidence is renewed and I believe entered continued.

THE COURT: Entered and continued, that's right.

MR. SCHAR: Judge, a couple quick things. You want the defendant present for notes or are they waiving his presence?

THE COURT: For that I'm willing to permit his waiver, but he's got to do it in person. Because the questions sometimes are very pointed and you may need to consult with him. If it's a question of can we see some exhibit that we didn't send back to them, fine, otherwise.... So he's got to be here relatively early. Whenever he arrives, you can signal Mr. Walker and we can dispose of that quickly.

MR. SCHAR: Judge, the only other thing is, I think we're pretty close on exhibits. There are a couple of things that you conditioned rulings on which need to be resolved. Mr. Niewoehner will speak to those, I believe.

:25AM

THE COURT: Sure.

MR. SCHAR: And the only other piece of business is, Mr. Walker was very helpful last time in letting us know at the end of the day when the jury had left, would it be possible to get that notice again?

:26AM

THE COURT: Have you done anything to cause me to change my policy?

MR. SCHAR: I don't believe we have, but --

:26AM

THE COURT: Yeah, those are our policies.

MR. SCHAR: Thank you, Judge.

THE COURT: And I don't anticipate that what we do in court is going to take a great deal of time, so we'll just basically interrupt whatever proceeding we're doing and move to that and do what we have to do.

:26AM

But basically what I'm going to do is, I'm now going to give the jury their instruction books, which means they can start talking.

MR. SCHAR: And do you want the exhibits to

:26AM

go back now or do you want to address --

THE COURT: No, you can address those later. There's a certain period where they're looking at the instructions and wondering about stuff and

:26AM they're organizing themselves and they're electing a foreperson, so you got a few minutes with the exhibits. How many exhibits are there that are in question?

MR. NIEWOEHNER: I think there's only three.

:27AM MR. SCHAR: We can address those.

THE COURT: Which three?

MR. NIEWOEHNER: I'll be quick.

Working backwards, there is a Chicago Academy grant funding e-mail that were shown to

:27AM Mr. Talcherkar, we'd object to that, it's hearsay. The content of the e-mails is hearsay. He testified it was used to refresh his recollection potentially; he testified to it. I'm not sure the foundation was laid anyway, but --

:27AM THE COURT: Well, whatever it is, I actually haven't seen them.

MR. NIEWOEHNER: I can show you, Your Honor. This is the defense exhibit binder and it's Tab 11.

THE COURT: Do you want this, assuming that

:28AM it was properly admitted? Because I recall it was

only used to refresh recollection, and I think you moved for its admission, and you can correct me if I'm wrong, but I think I admitted it and reserved the issue of publication.

:28AM MR. SCHAR: At this point you did not admit. There are two others that we'll get to which you are exactly right.

THE COURT: Okay. That's fine.

MR. GOLDSTEIN: Go ahead, as far as the

:29AM content.

MR. RIEBMAN: As far as the content, Judge, this is how Mr. Talcherkar communicated in the ordinary course of business with Mr. Filan as to this grant and how to obtain the funding. The

:29AM e-mails explains the efforts made to obtain the funding and they are an exception to the hearsay rule under business records as they constitute clear communications from their office.

This is how they discuss this particular

:29AM issue with the grant and it provides insights that's relevant and it's clearly reliable and accurate and explains the testimony on that issue and should be admitted.

MR. GOLDSTEIN: This was discovery the

:29AM government provided to us.

THE COURT: Yes.

MR. SCHAR: Your Honor, it's got multiple levels of hearsay going on. There are statements by Mr. Filan that wouldn't be admissible through the witness who testified, there's statements about lots of other people in there, and there's a lot of detail in it that, quite frankly, would be confusing that wasn't explained. So just putting aside the foundational issues, they would be seeking to put in the statements of Mr. Filan that there is an issue here for their truth.

MR. RIEBMAN: Judge, we would be willing to redact the portions.

THE COURT: That's the thought that was crossing my mind. I think they can redact this and it's fine. So why don't you do that. If you have a dispute about the redactions you can approach.

MR. NIEWOEHNER: So it's really just Mr. Talcherkar's statement -- e-mail out?

THE COURT: Right. And there may be some stuff of Filan that's just, like, you know, why are we doing this, or whatever it is. I think the defense can resolve the difficulties, in which case it's not really that big a deal.

Okay, what's the other one?

MR. NIEWOEHNER: I don't know the number. The racetrack bill, they put in a legislative history of -- I think there's an index in the front that tells you.

:31AM THE COURT: Number 9.

MR. NIEWOEHNER: And we'd object to that on relevance grounds. There is a fair amount of back and forth on that, which I imagine Your Honor recalls, but the fact that the racetrack bill might :31AM have been pending in the legislature for some months is irrelevant to the charge, which is that once it came to the defendant, that's the time period that matters.

It goes to an argument that somehow there's :31AM no harm here because the legislature could've signed if it was given to the governor the bill 6 months earlier, but that's not the point. The extortion here only took place once it got to the governor, so those earlier 8 months don't matter.

:31AM MR. GOLDSTEIN: Your Honor, this was history that the defendant testified to he explained --

THE COURT: You can have it. You can have it.

MR. GOLDSTEIN: Okay. Thank you.

:31AM THE COURT: What's the next one.

MR. GOLDSTEIN: The manual endorsement letter, right?

MR. NIEWOEHNER: Yes, I think that's the other one. Our view is --

:31AM THE COURT: Number 6.

MR. NIEWOEHNER: Again, it's a hearsay statement by someone who didn't testify about it and, quite frankly, there's no date on it, there's no foundation particularly for its admission in

:32AM terms of when it happened and what's said in it, and the relevance of it is also -- there isn't any.

MR. GOLDSTEIN: Your Honor, the letter was testified to by the defendant. He explained that he asked for a fundraiser from Mr. Emanuel via -- well,

:32AM Ari Emanuel from Rahm Emanuel from John Wyma, and this is in late May of 2006. The response back was "no, we're not going to do a fundraiser, but we'll write an endorsement letter." Mr. Blagojevich testified to the endorsement letter, he laid the

:32AM foundation for it, he gave the approximate time in which he received that letter, and it explains exactly what he was saying as far as this fund-raising issue, which is at the heart of the Chicago Academy issue. So it's clearly relevant,

:33AM the foundation is laid, and we ask that it be

admitted.

THE COURT: One of my concerns is that it's undated. You really don't know where it fits in the chronology.

:33AM MR. GOLDSTEIN: It is and that is the original document --

THE COURT: Yeah, it's not his fault that it's not dated.

MR. GOLDSTEIN: He did testify, though, when :33AM he received it. He gave an approximate time period when he received that letter, which was mid-summer of 2006.

MR. SOROSKY: And I would also add that the government certainly did interview Mr. Emanuel and I :33AM cannot believe the government did not go over this letter with him.

THE COURT: Well, you don't want to say, because what that are going to say is he was on the witness stand and you never asked him.

:34AM MR. SOROSKY: No, but I meant the government cannot really argue that there isn't any accuracy or legitimacy.

THE COURT: No, but there is a chronology to this and it's important, so this one is out.

:34AM So I'm sustaining the objection to 6, 11 is

going to be redacted, and 9 I'm overruling the objection.

MR. GOLDSTEIN: And, Your Honor, as to the Government Exhibits, I've looked through all of them, these are all the exhibits that were admitted, we're just preserving the objections to any objections we made.

THE COURT: Yeah, by agree to that these are the exhibits, you're not waiving your objections.

:34AM Okay, thanks.

MR. GOLDSTEIN: Thank you, Judge.

MR. SCHAR: Judge, we'll leave the Government Exhibits, the computer as well.

THE COURT: Do you want to take out the ones :35AM that -- redo that so that you can get it back to the jury quickly? If you do it very quickly, I want to put it on the same basket that they get the government ones on.

MR. RIEBMAN: We'll do that right away.

:35AM THE COURT: Okay.

MR. GOLDSTEIN: Your Honor, as far as the exhibits that we admitted, we've been getting requests from the press as to when these are to be released. Whatever Your Honor says as far as what :35AM we should do.

THE COURT: Let's wait until the end of the day. And usually when I grant that request, the release is always at the end of the day that I grant the request.

:35AM MR. GOLDSTEIN: Thank you.

THE COURT: We will deliver the instruction books to the jury.

(Recess.)

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(The following proceedings were had out of the

presence of the jury in open court:)

THE CLERK: 08 CR 888, United States versus Blagojevich.

MR. SCHAR: Good afternoon, Judge.

:22PM Reid Schar, Chris Niewoehner, Carrie Hamilton on behalf of the United States.

MR. GOLDSTEIN: Your Honor, Aaron Goldstein, Sheldon Sorosky, Lauren Kaeseberg, Elliott Riebman on behalf of Rod Blagojevich.

:22PM THE COURT: I have two motions for a mistrial, which since the trial is not over should be addressed with some alacrity. We also have remaining the question of the presence of the defendant if the jury passes out questions.

:22PM And I understand he's on his way?

MR. SOROSKY: Yes.

THE COURT: It was estimated he'd be here at 4:30. So we'll deal with some of the stuff on the motion for a mistrial. And we've dealt with motions :23PM before outside his presence, so I don't think that's an issue, and maybe he'll waive presence with respect to jury questions.

I do have one piece of information. The jury has elected a foreperson, the jury as set forth a :23PM schedule on what days they're going to meet, and

they have set a starting time and a closing time. They will be ending at a somewhat earlier hour than the hour that they usually ended at, but it's a full day. And they also indicated the obvious, which is
:23PM is that if they are in the midst of reaching a decision, all bets are off as for when they're going to leave.

So what I have is a large volume of motion for a mistrial filed on June 9th and a little motion
:24PM for a mistrial filed -- is it today or yesterday?

MS. KAESEBERG: It's today and it's just additional grounds to supplement.

THE COURT: Right.

I would like to hear a short answer of the
:24PM government to the mistrial motion with some exceptions I'm omitting because they are not issues directed to the prosecution, they're issues directed to the Court, and that is the first issue in the large motion.

:24PM MR. SCHAR: Which one is that? The title of the --

THE COURT: The title is the one that reads "The Court Made Findings of fact ..."

MR. SCHAR: Judge, I don't think the Court
:25PM made any findings of fact --

THE COURT: Yeah, well, you don't have to say that.

MR. SCHAR: Okay.

THE COURT: That's why it's addressed to something I did, not something you did.

:25PM

I think that's also true of the rulings. You can answer the "prejudicial comments" issue because that has to do with effect on trial. "Biasing influences" is for me. "Improper assignment" I don't think you have to address because it's really not addressed to anybody who can rule on that now and it's a little late in the game and there were other remedies to be used, and I don't even think they use it for that purpose, they use it to establish that the government might like one judge more than they might like another, a startling revelation which no one has ever thought of before. The rest of them I think are all things that you can answer briefly.

:25PM

:26PM

:26PM

MR. SCHAR: Judge, you want to go on a one-by-one basis or just go through all of them?

THE COURT: Yeah, just go through all of them briefly.

MR. NIEWOEHNER: Your Honor, starting on Page 8, the prejudicial comments one. I think if

:26PM

you look at the transcript of that, Your Honor made a direct ruling at the end of sidebar which was that the next part of the testimony should start on October 17th and then defense asked to essentially do something other than what your direct order had been. So in the government's view, it was entirely appropriate to point out what your ruling had just been, time shouldn't be wasted, and made the observation. And, ultimately, the defense did get in all the content that they wanted to to lead up to October 17th, they did work that in later. So there's no prejudice in terms of content and it was a short statement that was A, accurate, and B, not unduly prejudicial.

THE COURT: The next one for you is "Denial of Requests to Play Relevant Recordings."

MR. SCHAR: Judge, this goes -- this issue, I assume, is a rehash of the same issue, which is the defense provided a number of different recordings, they argued that huge chunks of them were state-of-mind exceptions even though the law is clear, as Your Honor has pointed out. I believe it's briefed extensively, at least in the last trial, that, in fact, you can't just argue that an entire call is state of mind, there have to be

particular statements and not just even large segments of the statement.

In addition to that, I think Your Honor is clear that not only was it not state of mind, but the best argument that the defense had was it was prior consistent statements if the defendant was actually challenged on the issues that the recordings would have gone to.

In fact, I guess two things, the first is, largely, most of the recordings that they wanted in were not in dispute in terms of the underlying testimony and the defendant wasn't challenged, if not, frankly, all of them in terms of what it would have supported, that's issue number one.

Issue number two is, it wasn't trying to put in any prior consistent statement without the challenge to the witness that required it.

And third, I would point out, to the extent the defense thought in some way that we had challenged anything that would have been properly rebutted with a prior consistent statement with one of the recordings, after the defendant left the witness stand the defense made no motion whatsoever to try to admit any of those recordings as prior consistent statements, which they would have been in

their right to do, if in fact they thought that, A, there had been a challenge to the defendant, and B, there was a recording that actually supported his version had it been challenged, that never happened.

:29PM THE COURT: The defendant "Was Improperly Driven to Testify By the Court."

MR. SCHAR: Judge, that's entirely, entirely untrue. There was not a single time that Your Honor indicated that he had to testify or was required to

:29PM testify. In fact, the jury instructions make it patently clear, he doesn't.

On top of that, what Your Honor did is enforce the rules of evidence in the context of scope, as well as other rules of evidence that dealt

:29PM with trying to get in information through the government's case through cross-examination that are properly put into the defense case.

There were all types of things available to the defense. They could have recalled any

:30PM government witness that they wanted to if they thought in fact they wanted to put in information that was outside the scope. They didn't need to call the defendant to do any of that.

In terms of the Cheek -- is this the section

:30PM that has the Cheek analysis?

In terms of the Cheek analysis, Judge, you never said pursuant to Cheek if the defendant wants to insert things in term of the willfulness argument, this is how he can or should testify.

:30PM What Your Honor did repeatedly -- I shouldn't say "repeatedly" but several times cited Cheek was noting that the reason that the defense was able to get in certain information was because the defendant in Cheek did testify, and, likewise in this case, if :30PM the defense wanted to get in certain information the defendant would have had to testify.

However, we're talking about apples and oranges type of analysis. In Cheek, the defense seems to have misinterpreted Your Honor's comments :31PM even though you never, ever said this: That somehow if this defendant testifies he can then talk about his understanding of the law. Your Honor never said that. And in Cheek, the reason the defendant could talk about his understanding is because it was a willfulness standard.

I understand, for whatever reason, including in this motion, the defense seems to consider these charges wilfulness charges, but they're not. You won't find the word -- I believe you won't find the :31PM word "willfulness" in the jury instructions at all.

So it seems we're in two different tracks. You never forced him or suggest that he absolutely had to testify. You indicated that if he wanted certain information in, only he could provide it, and that's true in every single case that there is only certain information that the defendant can provide.

:31PM

And to the extent that somehow they thought that if they put him on the stand because of the Cheek case that they'd be able to talk about his understanding of the law, that's not what you ever said, and that could've easily, if they had any doubt about that, been resolved with questions to Your Honor and/or a motion in limine as to what they thought they would be able to get into if this defendant testified and that never happened.

:32PM

:32PM

Judge, you want me to address healthcare --

You want to address those?

MR. NIEWOEHNER: Yeah.

The healthcare policies, Your Honor?

:32PM

THE COURT: I think that that one was tongue in cheek. He had plenty of references to his passion for healthcare.

MR. NIEWOEHNER: We actually embraced that in our closing argument.

:32PM

THE COURT: Yeah. And they don't spend a lot of time on it. So I think they just don't want to waive their point and they're entitled not to waive.

"Improper Rulings On Objections and the Government's Asking of Impermissible Questions" I will deal with myself.

It's your turn.

Oh, wait, wait.

(Brief pause).

THE COURT: Oh, Tusk.

MR. SCHAR: Yes, Judge. We need some clarity as to what the defense thinks that they were barred from doing.

THE COURT: We come to that point in time, anyway.

Go ahead. Either one of you, or both.

MS. KAESEBERG: I mean, if I can just start, just generally, to say, I mean, what we filed is a fairly extensive motion meant to use examples and illustrations to show sort of fundamental problems with fairness that we believe existed throughout the entire trial. I know it's extensive, so I'm not going to go through each one.

If I could just say --

THE COURT: Yeah, but what I want you to do

is answer what they've said.

MS. KAESEBERG: No, I know that, but, I mean, this isn't -- I do want to make a couple of comments, which is that this isn't meant to be an attack on the Court, not meant to be an attack on the government. What it is is a response to and a request for a mistrial based on what we believe are denials of our request and our pleas for fairness throughout this entire trial.

:34PM You know, I think that at some point maybe there's a perspective that's lost, so we stand here as lawyers representing a client that we to be innocent and we believe that we are fighting for his life, and there's just fairness aspects to this case :34PM that we believe has been overlooked and just cast aside.

THE COURT: Would it be any different if you knew that he was guilty?

MS. KAESEBERG: But that's not -- I mean --

:34PM THE COURT: I don't understand the known to be innocent part, because you are obliged --

MS. KAESEBERG: Well I --

THE COURT: -- you are obliged to defend him --

:34PM MS. KAESEBERG: Absolutely.

THE COURT: -- to defend him fully whether you think he's guilty or not guilty.

MS. KAESEBERG: Absolutely. But in this particular case, where we know there's evidence that :35PM if we were able to put it into the trial it would result in a not guilty verdict and we feel that we've been prevented from putting that in and from advocating for our client.

You know, I think the core matter here is :35PM that it doesn't -- you know, in our motion there is some language in here that there's indication from the Court that you're sort of mistrustful of us. It seems like every time there was an issue it was always sort of we never go the benefit of the doubt, :35PM it was always that we were trying to do some running out the clock or asking questions purposely to violate your order, which really wasn't the case.

And the truth is is that, you know, you may not like us, you may not even like our client, you :35PM may have formed opinions from the first trial for whatever reason, all we ask is that, and what we've asked from the beginning, is that you sort of do what you asked the jury to do, which is to set aside any opinions that may be formed. And these rulings :35PM from the Court, frankly, give a perception and an

indication that that didn't occur. And the truth of the matter is that we believe we did not receive a fair trial based on those rulings which are explained throughout the motion. I think we will rest on what's in the motion instead of going through each one individually. You know, at the end of the day, we just seek a fair trial and that's what this motion is about.

THE COURT: I'm going to rule now, unless you have something you would deeply like to say.

MR. SCHAR: I mean, I obviously vehemently disagree with any suggestion that Your Honor was biased, but I don't want to get into heavy arguments about the quality of questioning and the abilities, so I think if Your Honor is ready to rule and there isn't a particular Tusk issue that needs to be addressed --

MS. KAESEBERG: I think I did overlook the Tusk issue. From our perspective, we were prevented -- I know the one instance, early on in the case, John Harris was the first government witness. We were prevented from asking questions of Mr. Harris about the circumstances under which Mr. Tusk left the governor's office, which was there was some anger on the part of Mr. Tusk making comments

about Greenlee, about the fact that, oh, I can get this guy, I forget the exact language.

THE COURT: Yeah.

MS. KAESEBERG: So we're prevented from asking that of Mr. Harris, and then I believe it was right before Mr. Tusk testified, I think the government tendered to us the documents that they prevented us from getting into anything with Mr. Tusk. But at the end of the day, I mean, this sort of doesn't even really matter because the truth of it is the government knows that whether they disagree with what we say about what Mr. Tusk meant by statements about Bob Greenlee, that there is an argument being made that he did have a motive to lie. So to stand in front of the jury and say, look that jury in the eye and say Mr. Tusk had no motive to lie, it's just not true, it's just not true.

It doesn't matter what your interpretation of what Mr. Tusk said or didn't say, it's the fact that they government can't say it's certain. So for them to get up and say that was, frankly, was not true. We objected, I believe I objected and said there's a pretrial issue with this, which I guess was a mid-trial issue so maybe that wasn't the right language, but there was an issue about Mr. Tusk's

motive to lie in this case. So for the government to get up and indicate that there wasn't is just false.

So I may have misstated in our motion, I did :38PM do it quickly this motion, that there was a motion in limine about it, I believe that's not accurate, but whatever the issue is, that was false what they said to the jury.

MR. SCHAR: Well, Judge, this one I would :38PM like to respond to. I take her at her word that it was inaccurate and not false in terms of what she put in the motion.

A couple of things; the first is, they did ask a couple of questions to Mr. Harris, those were :38PM properly objected to because he was the wrong witness. It would have been hearsay and improper to try to impeach another witness who had yet testified, or they weren't even sure was going to testify in terms of going through Mr. Harris.

:38PM Now, on May 17th I did tender to them a letter, which I believe is what they're talking about, that laid out some of the background of Mr. Tusk leaving. We expected them, frankly, to cross-examine. I spent time with Mr. Tusk. There :39PM is zero, I say zero evidence at all that he holds

any grudge whatsoever against this particular defendant or the administration. He left under terms that he was unhappy with at the time on one particular issue and he was over it almost immediately. I'm the one that spent time with him. So to impugn my integrity in suggesting that somehow I knew that he had a bias and misled the jury is just inaccurate.

:39PM

But I understand they haven't spent time with him, that's why we gave them the letter. We gave them the letter, and frankly, if they wanted to cross-examine him on it, we did not move Your Honor to bar it, that's, to me, the irony of the situation.

:39PM

We provided them with the information. If they wanted to cross on it, they were free to cross on it. Mr. Sorosky, I believe, is the one who did the cross--I could be wrong--he never raised the information in the letter we provided them. That's their decision. We didn't move Your Honor to bar it and Your Honor didn't bar it.

:39PM

Now, maybe they're mistaken and misunderstood what was going on and maybe they don't remember it exactly how it happened, and I give them the benefit of the doubt on that, but to suggest somehow we

:40PM

barred them mid-trial from doing something when we actually gave them information to do it.

And then I got up, Judge, and given the information that I know and, frankly, given the evidence that was here, what I said was, I believe, that Mr. Aaron Goldstein did not provide any motive for this individual to lie, and he didn't. So I think my statements were not only literally accurate in terms of what happened at the trial, they're based in good faith based on the time I spent with Mr. Tusk and what I know.

THE COURT: Okay. With respect to the issues in order raised by these motions, and Tusk I regard as those invited to by defense as the last item on the original motion, the first premise about factual findings is wrong. I made no factual findings at all. I have made findings with respect to the admissibility of evidence which requires consideration of the content of the evidence, but it is not finding of a fact in issue.

Evidence which is offered to prove a fact requires consideration of its relevance and to consider its relevance on whether it tends even in the most minimal way to prove facts for which it is offered does require a court to examine the context

of the defense or the prosecution theory of the case, either one, sometimes both.

To do this requires the lawyer who proposes its use to tell the Court how the evidence fits in. :41PM In this case, defense counsel was, for its own reasons, generally vague about the contours of the defense, inviting me to rule without clear information.

So I offered possible lines of defense, all :41PM of them hypothetical, in order to elicit from defense counsel whether my hypothetical is, in fact, the basis of their defense. Neither of the two-sided examples is a statement of my finding of fact. It is a statement of arguments or positions :42PM that counsel might take. In one case it was, I believe, a possible defense position and the other a possible prosecution position. Both examples were designed to elicit some clarification from counsel as to what exactly they were trying to do.

:42PM The fact is that the tapes would justify a prosecution argument, I'm not making a finding, that the tapes would justify an argument that the defendant was told not to do something and then just ran over it. The fact is that this argument does :42PM present a problem for the defense, this is not a

conclusion, this is a fact about the trial process itself and not about the charges. Those findings of fact, I reiterate, are not findings of fact about the charges, they are findings of fact about the
:43PM nature of the trial and they bear on the relevance of the evidence. In fact, they are not, I think, strictly even findings of fact, they are findings of what something might mean in the context of this trial.

:43PM This is really true of also of the continued practice of counsel and defendant referring to a deal with the Madigans, as if it were in the process of negotiation with the Madigans. It was important for me to understand something which defense counsel
:43PM did not make clear, and, indeed, the defendant in his own testimony did not make clear until the very end, and that was my understanding of whether the deal was in fact under consideration by the Madigans or only a possible option that the defendant and his
:44PM staff were themselves considering.

It was important for me to understand that no deal had been proposed and this was not at all clear to me--"proposed" meaning proposed to the Madigans--this was not at all clear to me until I
:44PM examined the tapes that were tendered by the

defense. If it was unclear to me that there had not been a proposal made to the Madigans but merely the possibility that one might or might not be made, it was possible that this may be unclear to the jury. The entire colloquy on this point could have been obviated had defense counsel clearly stated at its beginning that there was no Madigan deal presented to the Madigans, but defense counsel did not admit this. Ironically, the defendant himself when he finally got on the stand was quite clear on that point, that he had not actually made the proposal. In fact, I think his statement on the witness stand was, when he was talking about going to bed on the night of December 8th, he actually made a point of inserting in an answer to a question he was asked by Mr. Schar, this was the beginning of possibly a Madigan deal. This was not the way defense counsel spoke during the course of this trial, this was not the way the defendant spoke during most of his examination. But he was, when it came to those final days, quite clear that there had been no Madigan deal proposed. He was looking for somebody to be an intermediary. Why defense counsel were reluctant to make this clear to me and why when I said, for example, dealing with the tape on

December 3rd, I looked at a dialogue and I said, "well, based on this dialogue on December 3rd no Madigan deal had been made, in fact the Madigan deal hadn't been presented," I got no concession from defense counsel.

:46PM

And this I think is an example on which they place a great deal of weight. There is evidence in this case against the defendant that has significant weight, but I have consistently stated to defense counsel that the defendant has a path to acquittal and that he could well save himself by testifying. It was an opinion that I had when I uttered it and it is an opinion that I still have. And the truth of the matter is, in federal cases in this court, that possibility isn't always there. In fact, it's relatively rare, which accounts for the extraordinarily large number of cases that end in guilty pleas in this court. It is the jury's call to decide whether the charges have been proved beyond a reasonable doubt. It is not a question that has been presented to me. And I follow the practice of almost any judge who has been on the bench for more than 6 months, which is not to make a decision until the question has been presented to you, sometimes judges try to avoid even that, and I

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have followed that practice here. I have not been called upon to decide whether the defendant in this case is guilty of anything or not guilty of anything. That's the jury's job, not mine, and I'm :47PM not interested in doing someone else's work.

The fact that I heard the evidence at the first trial has not had any influence on my state of mind of this trial. There, too, the judgment was made by the jury, not by me. Although, in the end, :48PM that jury didn't make a lot of judgments. I was never called to rule upon or decide the question of guilt. I reiterate that I follow the wise rule that judges shouldn't decide what they do not have to decide.

:48PM It is true that I have expressed lack of confidence in the statements made to me by defense counsel. This is based on conduct of defense counsel both in this case, this particular trial, and the trial which preceded it. I have seen :48PM attempts to smuggle inadmissible evidence into the courtroom while the jury sat in box. I've seen conduct clearly in violation of my pretrial rulings. I have seen stalling efforts, and I regret this has occurred, but I never presumed that this was the :48PM case, I have found that this was the case. I have

found also and stated on the record that some defense counsel in this case have operated on the premise that it would be easier to do what everyone pleases and apologize later rather than ask permission.

:49PM

And, in fact, one of the problems I think the defense has had in this case is situations in which had they asked permission, they might have gotten it. But as Mr. Schar pointed out with respect to one thing that's raised, that's the Tusk matter, there apparently was maybe no desire, maybe a reasonable decision, not to approach the Court to ask for permission.

:49PM

I believe that a few critical comments I made in open court were necessary to insure that everyone involved in the trial understood that certain evidence offered or sought to be offered should not be considered on the merits.

:49PM

There were times when defense counsel sought to invoke an impression amongst jurors that they had worthwhile evidence that was being unfairly excluded, an invitation to the jury to the possibility that evidence which they did not hear was wrongfully excluded in reaching their verdict and then to speculate on what it might have been.

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If I have erred at the side or in prior rulings in excluding evidence, the place to challenge that, if the defendant is in fact found guilty, is in the Court of Appeals, not in the presence of the jury.

:50PM It is also true that -- well, let me add one other point. I don't believe, to my recollection, that I have admonished either counsel or a witness in the presence of the jury without having first delineated my rulings outside the presence of the

:51PM jury.

Admonitions to counsel or parties given outside the presence of the jury, at times, may be regarded by lawyers, defense, and prosecutors for that matter, as relatively meaningless in the

:51PM context of the trial and in fact provide no deterrent to asking previously barred questions in the juror's presence or raising a suggestion suggesting previously barred arguments or assertions.

:51PM This was true in the first trial where the same lawyers representing the defendant, where the same lawyers representing the defendant in this case, one of the first if not the first cross-examination included a series of questions

:51PM which were clearly barred by pretrial rulings,

objections were sustained after the first objection, perhaps counsel would have paused to realize that this was an area that was barred to them, but several questions followed it and in each case I had to sustain the objection.

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It is my judgment that when I admonished persons in the presence of the jury, that was, in the context of this case, the only effective remedy against repetition of barred conduct, and that remedy was to admonish as I did.

:52PM

The challenge to the manner of assignment of this case comes so late that I wonder why it was included. And that challenge, if any, can be brought only effectively before trial begins and then, arguably, is to be brought to the Chief Judge of the district and the Executive Committee over which he presides. It is, in any event, a complaint against the prosecutor, and not the Court.

:52PM

The claim that a disproportionate number of evidentiary rulings were made in favor of the prosecution rather than the defense is clearly stated as a ground for a mistrial. I'd estimate that this is usually true in virtually all criminal cases because it's a product with the different incentives our legal system gives the prosecutors

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and defenders. A prosecutor has to be more careful in questioning and motions. If a conviction is obtained, the defendant may appeal and challenge the prosecution's conduct and there's a consequence the :53PM prosecution might lose a verdict it had gained. If the defender -- a defender, obviously, has far less need to be careful. If there's an acquittal caused by defenders overreaching, there is no deal on it for the prosecution.

:53PM If someone were to search a year's worth of criminal trials in the district, I would predict that the prosecution would be disproportionately, very disproportionately successful in defeating objections in opposition than would the defense.

:54PM Finally, the defender has the unrestricted power to create a disproportion by frequent objections, invalid though they may be. The prosecutor is institutionally restrained from making a lot of baseless objections to even up the rulings :54PM count.

The prior recording ruling I made is, in my view, indisputably correct. What was offered was hearsay under the rules. The requisites of the catch-all exception does not apply to this evidence. :54PM The argument offered that this evidence is the best

available evidence the defendant's stream of consciousness thought process, but the stream of conscious thought process does not, by itself, demonstrate anything more than he engaged in I guess
:55PM a kind of stream consciousness speedy talk.

There was a lot of evidence, actually, of this method both in other tapes and, frankly, in some moments of his testimony. It's not actually the stream that the defendant offers. What the
:55PM defendant might have wanted to hear is the right to use what was said in the stream as a prior consistunt statement, but he wasn't impeached with an inconsistent statement, and if that is not the case, the prior consistent statement doesn't come
:55PM in.

The other thing perhaps the defendant would've liked is to use the stream--which covered a lot of subjects, in great rapidity--was to use the stream to allow the defendant in either to say what
:56PM he meant, not what he said, or he can explain what he meant, but he did that without the recording and the recording adds nothing to it. He is basically seeking to arm himself on an attack that the government did not make. They didn't say that his
:56PM statements were inconsistent, they argued that they

were lies.

With respect to his being driven to testify, I have not only the power and authority under Rule 611 of the Federal Rules of Evidence to control the order of evidence, in fact 611(b) defines the scope rule as the stated rule. It is the default rule. It is true that strict enforcement of the scope rule is far less frequent than it used to be, but I thought it was entirely appropriate in this case, because in this case it's the most efficient, fairest way to present the case. And I had before me the example of a prior defense on these various charges that made a defense theory out of suggestive questions rather than proof of facts.

With respect to the Cheek case, the government has I think clearly stated that the defense has misread what I said about Cheek. But let's assume they haven't, let's assume I told them that this stuff that they wanted to get in comes in, and I said this to them, I said this to them at sidebar. The fact of the matter is is that defendant to do their defense in this case ought to at the very minimum, leaving aside the distinctions that it's willfulness and it's tax law, at its very minimum before they make the decision to put a

defendant on the stand and get his concurrence with that, they really ought to read Cheek, it wouldn't hurt to read it a second time, and realize it is based on the complexity of the tax code.

:58PM From my point of view, I see no evidence that defense counsel had made its own independent reading of Cheek. That they did not do so might possibly be raised on a 2255 petition if the occasion to file one arises in the future. But the truth is is that :58PM the defendant was not compelled to testify, not by his understanding that something was legal. This, after all, constituted a very tiny part of his testimony. He testified because it was clearly his best choice. He knew, as did his counsel, that he :59PM narrowly escaped conviction on several charges by a vote of a single juror, he knew, too, that the government had simplified its case because of the reaction of the jurors to the complexity of the first case. The record does not support any claim :59PM that he was forced to testify. This is an individual decision and made by an individual who I've been told has eagerly awaited and announced that he has eagerly awaited the chance to tell his story, that's why he testified.

:59PM I leave to one side the fact that defense

counsel knew or should have known that the jury would be instructed at the end of the case that it was not necessary that the defendant knew his acts were unlawful. The defendant was entitled to make a good faith defense, the basic outlines of which were known to him because he said it over and over again in the recordings, "not one for the other"; these are two additional reasons but I'm not at this particular moment relying on them.

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With respect to his passion for healthcare, I don't think he missed too many chances of being able to get that in, frequently at the end of an answer, but he also got it in in many of the recordings --"got it in" is the wrong statement, it's unfair to him--he also mentioned it consistently in the recordings which the government played. That he had some passion for healthcare, I did not see any labor of argument in what the prosecution said in nearly four hours that indicated any disagreement with the proposition that he had a passion for healthcare. Didn't, I think, touch on it in any way.

With respect to the rulings on objections, the example they gave is, in my view, a classic example of no significant differences. The government's cross-examination of the governor "you

are a convicted liar" followed by specific references to one act of lying which the governor was convicted of having perpetrated.

MR. SCHAR: Yes, Judge.

:02PM THE COURT: What we had with --

Was it Rajinder Bedi?

MR. SCHAR: Yes, Judge.

THE COURT: What we had with Rajinder Bedi was one conviction for theft and the opening is "so

:02PM you were a thief," which is a form that implies that this was a profession of his, a frequent occurrence. It would've been a good question if you just said "so you have been convicted as a thief," but those niceties I found rarely in the defense. And there's

:02PM nothing wrong with the question from a tactical point of view, "so you're a thief," the defense would like to have the suggestion, so I understand why it was made, but there was in my mind a very different approach by the prosecution which made it

:03PM clear to the jury it was talking about one instance. Now, it is true they talked about other instances as well, but each one of them is separately identified and each one of them had a separate root. I thought the way the question was supposed to Bedi twice made

:03PM the single incident seem much broader than it was, I

thought it was objectionable and I so ruled.

There is also an issue raised about my willingness to interrupt the defense direct testimony to allow preliminary cross-examination, at least part of it. That was based on my finding, not my presumption, but my finding based on what I saw before me that defense counsel was stalling to end out the day without having the defendant cross-examined. I actually had originally thought that the reason for that is, you would leave a defendant uncross-examined for the next three days and then somehow the testimony would sink in. It appears after I saw the cross-examination that maybe defense counsel was concerned about something else rather than leaving it as it is, I don't know. But I do know that they were stalling, I know that there were repeated questions, I counted at least two or three times in which the same question was repeated either two or three times, I was in front of my court reporter's realtime where there may have been a couple where the same question was asked four times. The pacing of the question was quite clear to me. And the reason I made the decision I made is because I could understand the tactical value, and I had heard counsel ask questions in a different and

more expeditious way.

I also noticed that at the end of the cross where I believe the defendant was stalling, this was Wednesday not the Thursday --

:05PM MR. SCHAR: The direct, Your Honor.

THE COURT: Yeah, in the direct, sorry, sorry. I believe this was on Wednesday and not Thursday, it was at the end of the day and I offered counsel the chance to speak to this the next day in

:05PM the morning and counsel did not choose to speak. I adhere to my view that it was an attempt to stall. I understand it, I'm just unwilling to permit it.

With respect to Tusk, what you said about Tusk may very well come within the ambit of Brady,

:06PM but whatever Brady or Giglio obligations rested on the prosecution, they complied with them. And all of this stuff was known, it wasn't used. And in fact, I don't think the government has to accept or did accept that this was a motive to lie.

:07PM That Tusk was angry with Blagojevich, accepting that as the truth, does not mean that Tusk would lie about Blagojevich. It's something that the defense could use, if it chose, and could argue from it that Tusk had a motive, but it does not

:07PM represent an instance in which in closing argument

the prosecutor can fairly be said that the prosecutor made a statement that he knew was not the truth. So that motion for a mistrial is denied.

Obviously, this ruling was made on short notice, there may have been arguments that I have neglected, but because it's a motion for a mistrial while the jury is sitting, it has to be ruled on promptly because I don't want them to go to verdict. There will probably be a rehearsal of this if there is a conviction in a motion for a new trial and can be dealt with in greater detail later.

Is your client here?

MR. SOROSKY: Yes.

THE COURT: Just come up here, Governor.

(Brief pause).

DEFENDANT BLAGOJEVICH: Yes.

(Brief pause).

THE COURT: The one thing I wanted to ask you about, Governor, is, the jury is out now. It may be from time to time that the jury asks a question. Usually it's a question about law. Whenever a jury asks a question, I summon all of the lawyers and we go over the question and we decide what should be done. Your attorney has indicated to me that you might wish to be excused than being called back to

court for those things. I'm quite willing to do that but I have to hear it from your own lips. So is it your wish not to come when the jury asks questions?

:09PM DEFENDANT BLAGOJEVICH: If it's okay with you, Judge.

THE COURT: Yeah, it's fine with me, but I just want to make sure that have you discussed it with your lawyers?

:09PM DEFENDANT BLAGOJEVICH: Yes, I have, Judge.

THE COURT: Well, if that's the case then, Governor, you are excused from coming in. You're free to come in any time, you're not barred, but if you don't want to come in, you don't have to.

:09PM DEFENDANT BLAGOJEVICH: You don't mind if I don't, Judge?

THE COURT: No, I don't. It's fine. It's you decision.

Anything else?

:09PM MR. SCHAR: Judge, one quick sidebar matter, if we could?

THE COURT: Sure.

:09PM

(Proceedings heard at sidebar on the record.)

MR. SCHAR: I just wanted to let you know something that Sanborn brought to our attention. Apparently the jurors went and got lunch today in the cafeteria where the press is hanging out.

THE COURT: Yeah.

MR. SCHAR: I'm not -- I don't think they are probably bothered, but apparently several members of the press picked up very quickly, I don't know how they do this by face, that that one juror that got moved to the back knew her number and noticed that she was not there. So they don't know whether she's been booted, or removed, or moved to the back. We're obviously not saying anything, but to the extent the jurors are going to be in the cafeteria, there is a potential that they're going to be observed by the press.

THE COURT: This was observed by the court security officer. We are going to try to avoid that in the future.

Based on this case and the previous trial in this case and Family Secrets, the practice was to try the cafeteria. And Family Secrets had worked, like, a week before they caught on. This one is

more difficult because they don't actually eat in the cafeteria, they go to the room and the media room is right there. So we do have a room for them on the 10th floor and we're going to go back to ordering food so that this doesn't come again.

:18PM

Also, apparently the press is asking for the jury verdict form, obviously under the impression there is some information in that. The jury verdict is about as opaque as it you can possibly get. So we're going to release the blank jury verdict form to them.

:18PM

MR. SCHAR: In terms of schedule, Judge?

THE COURT: I'll tell you what time they plan to leave, but I'm not telling to the press. They leave sometime between 3:00 and 3:30, depending on how things are going, because it simplifies everybody's work schedule. And obviously if they send me a note which says Monday through Thursday, which is what they said, this is likely not to be a short deliberation. In a case like this, even if all the jurors are unanimous from the first day on some counts, either way, on every count either way, my bet is is this is well, we can't sign it now, we got to read all this stuff. So I think we're going to be here for a while.

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MR. GOLDSTEIN: Your Honor, how did you want -- last time I think you wanted us to, like, check in every day like at 9:30 or something like that, do you want that to happen again?

:19PM THE COURT: Since I got that note, my views have changed, you can check telephonically.

MR. SOROSKY: What's that?

THE COURT: Telephonically.

MR. SOROSKY: Telephonically.

:19PM THE COURT: The only thing is is somebody from each side, at least one lawyer from each side has to be like ten or fifteen minutes away, okay?

MR. SOROSKY: Yes.

THE COURT: Okay? We're set?

:19PM MR. SOROSKY: Yes.

MR. SCHAR: Thank you, Judge.

MR. SOROSKY: Thank you.

MR. SCHAR: Have a good weekend.

THE COURT: Thank you.

:19PM (Proceedings resumed within the hearing of the jury.)

THE COURT: See when I see you.

MR. SCHAR: Thank you, Judge.

MR. SOROSKY: Thank you, Judge.

:13PM MS. KAESEBERG: Thank you, Your Honor.

THE COURT: All right.

(Adjournment taken from 4:13 o'clock p.m.)

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I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER

/s/Blanca I. Lara date

_____ _____

Blanca I. Lara Date